No. [redacted] 91

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

JOHN WILEY & SONS, INC.,

Petitioner,

against

DAVID LIVINGSTON, as President of District 65, Retail, Wholesale and Department Store Union, AFL-CIO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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Table of Cases

Miscellaneous

Statute

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Opinions Below

The opinions of the Court below (Pet. App. A-9, A-35) are reported at 313 F. 2d 52. The opinion of the District Court (Pet. App. A-1) is reported at 203 F. Supp. 171.

Jurisdiction

The judgment of the Court below was entered on January 11, 1963 (Pet. App. A-37). Petition for rehearing was denied on February 5, 1963 (p. 162a of certified record). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Questions Presented

Whether it was within the power of the United States Court of Appeals for the Second Circuit to direct that the petitioner should submit to arbitration as to what rights survived to the members of the respondent Union after a consolidation by petitioner with Interscience Publishers, Inc., the latter corporation having been in collective bargaining relationship with the respondent. A subsidiary question is whether the lower Court had the power to direct the arbitrator to determine whether the respondent had complied with the grievance machinery of the collective bargaining agreement.

Reason for Denying the Writ

We rest largely on the opinions of the Court below which clearly and most learnedly set forth the nature of the problem, the issues involved and the state of the law, including the divergence of opinions between the various Circuits (Pet. App. A-9, A-35).

As was quoted in the very latest Court case on the subject:

> "It has been authoritatively decided that in suits under section 301 to compel arbitration the function of the courts is narrowly limited to determining 'whether the reluctant party did agree to arbitrate the grievance * * *. An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation which covers the asserted dispute. Doubts should be resolved in favor of coverage.' United Steel Workers v. Warrior and Gulf Navigation Co., 363 U. S. 574, 582-583 (1960)";
>
> *Textile Workers' Union* v. *Newberry Mills*, ——— F. 2d ———, 52 LRRM 2650 (4th Cir. 1963).

This Court has clearly spoken on many occasions on this question, and has been understood by the Courts, as exemplified by the Court's opinions in the case at bar and by the opinion of Chief Judge Sobeloff in the *Newberry Mills* case, *supra*. This Court has already sufficiently delineated the respective roles of arbitrators and the Courts in the arbitration of labor disputes, and while there may be some differences as to procedural aspects, there is substantial accord on the fundamental principles and there is no need for the further involvement of this Court. *See, Analysis* BNA Labor Relations Reporter Vol. 52 #23, 52 *Analysis* 45.

In *Local 748 I. U. E.* v. *Jefferson City Cabinet Co.*, — F. —, 52 LRRM 2513 (6th Cir. 1963), the Court, by Circuit Judge Miller, followed Judge Medina's views, as expressed in the case at bar. Judge Miller, too, had no difficulty in construing this Court's opinion in the *Steel Workers* cases, 363 U. S. 564; 363 U. S. 574; 363 U. S. 593 (1960), and the *Drake Bakeries Inc.* v. *Local 50* case, 370 U. S. 254 (1962).

Nor did Judge Rives have any difficulty with this Court's opinions, for in *Deaton Truck Line* v. *Local 612 Teamsters*, — F. 2d —, 51 LRRM 2552 (5th Cir. 1962), he held that the question of compliance with the grievance and arbitration procedure of a collective bargaining agreement was for the arbitrator, relying again on this Court's views as expressed in the *Steel Workers* cases. *See also, Greater Kansas City Laborers* v. *Builders' Association*, 213 F. Supp. 429 (W. D. Mo. 1963); *Brewery Workers* v. *Bevington and Basile*, 213 F. Supp. 437 (W. D. Mo. 1963); *United Furniture Workers* v. *Mohawk Corp.*, 212 F. Supp. 933 (M. D. Pa. 1963); *Carey* v. *General Electric Co.*, — F. 2d —, 52 LRRM 2662 (2d Cir. 1963).

The case at bar was reconsidered by the Court below on a petition for rehearing with the request that the matter be considered *en banc* and the petition was denied. Just

recently, the same Court, in the *Carey* v. *General Electric* case, *supra*, by Judges Friendly, Kaufman and Marshall reaffirmed the Court's decision below. Thus, five of the judges of that illustrious Court have studied this Court's pronouncements and have made decisions thereon without dissent.

As this Court said in *Steel Workers* v. *American Manufacturing Co.*, 363 U. S. 564, 566-567:

> "Section 203(d) of the Labor Management Relations Act, 1947, 61 Stat. 154, 29 U. S. C. 173(d), states, 'Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for the settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement * * *.' That policy can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play.
>
> "* * * The question is not whether in the mind of a court there is equity in the claim. Arbitration is a stabilising influence only as it serves as a vehicle for handling *any and all disputes that arise under the agreement.*" (Emphasis supplied.)

Each Circuit certainly should be allowed some latitude in determining procedure, particularly in arbitrations where flexible remedies have been mandated by this Court. Surely, the fact that one Circuit prefers giving more latitude to the arbitrator should not be a cause for concern by the highest Court in the land.

It must be remembered above all that the decision below does not involve anything of supreme importance so far as substantive law is concerned. The decision deals largely, if not exclusively, with procedural problems and directs the parties to proceed to arbitration and leaves it to the arbitrator to deal with the substantive problems in accordance with the directions of this court in *Warrior & Gulf*, *supra*, and *Textile Workers Union* v. *Lincoln Mills*, 353 U. S. 448 (1957).

As was stated by one eminent authority in the field of labor relations:

> "Less harm is done by sending an apparently weak case to arbitration than by denying the moving party the opportunity to be heard in the forum having the primary responsibility for determining the issue."
>
> Cox, *Current Problems in the Law of Grievance Arbitration*, 30 Rocky Mt. L. Rev. 247, 265 (1958).

As far as petitioner's claim that the decision of the Court below is in conflict with decisions of the 4th and 6th Circuit Courts of Appeal relating to the issue of enforcement of a collective bargaining agreement after its termination (Pet. 15-16), the Court below quite ably distinguished the case at bar from the 4th and 6th Circuit cases (Pet. App. A-18, 19) and we rest on the learned Court's distinction.

Insofar as petitioner's claim of mootness is concerned, a careful perusal of the issues sought to be arbitrated clearly indicate that the issues are not moot. Surely, the rights of the employees to vacation pay, severance pay, seniority, grievance procedures and to health and welfare payments are very much alive. *See*, footnote 4, opinion below (Pet. App. A-20). This Court, in at least two cases, recently denied certiorari on much more important issues involving similar vested rights. *Zdanok* v. *Glidden*, 288 F. 2d 99 (2nd Cir. 1961), aff'd other grounds, 370 U. S. 530, rehearing denied, 371 U. S. 854 (1963); *Oddie* v. *Ross Gear and Tool Co.*, 305 F. 2d 143 (6th Cir. 1962), cert. denied, 83 S. Ct. 318 (1962). However, if this Court finds, as petitioner claims, that all of the issues tendered for arbitration, with one exception, are moot, then there is less compelling reason for this Court to review the decision of the Court below.

Conclusion

In conclusion, while the petitioner seeks to make this "an extraordinary complex case," in essence, the issues are not so difficult as to justify this Court's intervention. As set forth above, the question is, should arbitration be had as to whether rights of employees accruing under successive collective bargaining agreements are absolutely cut off by a corporate consolidation pursuant to a New York statute which provides that liability on all contracts shall continue under such consolidation, and as to whether there was compliance with the grievance machinery.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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